

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

with affidavits of mailing

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~~74-8429~~

To be argued by
PETER C. SALERNO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-8429

RICARDO BORROTO,
Petitioner-Appellant,

—v.—

WARDEN, FEDERAL HOUSE OF DETENTION, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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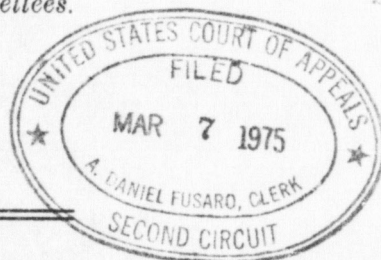


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
RICARDO BORROTO, :

Petitioner-Appellant, :

-v- :

Docket No. 74-8429

WARDEN, FEDERAL HOUSE OF :
DETENTION, et al., :

Respondents-Appellees. :
:

-----X
BRIEF OF RESPONDENTS-APPELLEES

Preliminary Statement

Ricardo Borroto ("Borroto") appeals from an order of the Honorable Inzer B. Wyatt of the United States District Court for the Southern District of New York, filed December 13, 1974, denying Borroto's application for a writ of habeas corpus or mandamus.

Borroto filed a notice of appeal, an application for mandamus, and an application for an expedited appeal on December 16, 1974. On February 20, 1975, this Court denied the writ of mandamus and expedited the appeal.

The Nature of the Case

On December 11, 1974, petitioner-appellant Ricardo Borroto ("Borroto"), an inmate at Federal Detention Headquarters at West Street ("West Street"), filed a "Petition for a writ of habeas corpus and/or mandamus" in the United States District Court for the Southern District of New York. Also on December 11, Borroto obtained an order to show cause, returnable December 13 at 2:30 P.M. before the Honorable Inzer B. Wyatt, why a writ of habeas corpus should not issue.

The sole relief sought in the District Court was an order restraining the Warden of West Street and the United States Attorney's Office from interfering with visits to Borroto by a so-called "interpreter/investigator" named Gerardo Sanchez. Judge Wyatt noted in open court that such relief was not properly brought in a habeas petition (Tr. 2).^{*} He treated the application as one for a writ of mandamus and denied it. His memorandum endorsed order reads: "After hearing in open Court, this application is denied. So ordered."

^{*} "Tr." refers to the brief transcript of the hearing before Judge Wyatt, a copy of which is annexed to the appellant's brief on this appeal.

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On this appeal, Borroto seeks reversal of Judge Wyatt's decision. As is noted in paragraphs 9 and 10 of the affidavit of Assistant United States Attorney Peter C. Salerno, sworn to December 23, 1974, submitted in opposition to Borroto's mandamus petition in this Court, the "interpreter-investigator" in question, Gerardo Sanchez, is a convicted felon who is still on parole. The allegations of Borroto's petition in the District Court show no generalized hindrance of West Street prisoners' access to the courts, but rather a hindrance only of Mr. Sanchez' access to West Street. This allegation does not state a violation of Borroto's rights; the decision of the District Court should therefore be affirmed.

In the alternative, this Court may deem it proper to dismiss the appeal as moot, because of Borroto's recent transfer to a prison in Florida to serve the remaining months of his term. See the letter to this Court from Gerardo Sanchez, dated February 24, 1975, and the affidavit of Assistant United States Attorney Peter C. Salerno, sworn to March 6th, 1975, submitted with this brief. As Mr. Sanchez' letter points out, this appeal is

academic since the only relief sought relates to Borroto's former incarceration at West Street. As the Salerno affidavit and the affidavit of Mr. Anthony Talak accompanying it point out, there was nothing improper about Borroto's transfer, and in fact he appears to have been desirous of it.

ARGUMENT

POINT I

APPELLANT HAS NO ABSOLUTE RIGHT TO VISITS FROM SOMEONE NOT A LAWYER

On the merits of this appeal, appellant, speaking through Mr. Sanchez, claims that his right of access to the federal courts was infringed upon by alleged restrictions on Sanchez' visits to West Street. It is not clear precisely what Sanchez is or was needed for, since the only action pending in the Southern District of New York or the Second Circuit that involves Borroto is the instant one.* In any event, Sanchez is not an attorney, and Borroto has no absolute right to his services by means of personal visits.

The principal cases upholding a prisoner's right to the aid of persons other than attorneys, for the purpose of implementing the so-called right of access to the courts, are Procunier v. Martinez, 416 U.S. 396 (1974), and Johnson v. Avery, 393 U.S. 483 (1969). Neither of these cases supports the relief sought by Borroto.

* Borroto had filed a habeas corpus petition, which was denied by the Honorable Charles M. Metzner on November 14, 1974. Borroto v. Warden, 74 Civ. 2519. The time of appeal expired without an appeal being taken.

Thus Procunier v. Martinez only invalidated regulations imposing an absolute ban on prison visits on behalf of an attorney by a class of persons, namely law students and paraprofessionals, from whom there was no reason to suspect, on an across-the-board basis, any threat to prison administration. Also, Procunier has been interpreted as holding that a constitutional question arises only when a ban "imposes a substantial burden on the right of access to the courts' by 'inhibiting adequate professional representation of indigent inmates.'" Souza v. Travisono, 498 F.2d 1120, 1123 n.6 (1st Cir. 1974), quoting 416 U.S. at 420 (emphasis added).

The case at bar is quite different. Sanchez' visits to Borroto at West Street were not requested by any attorney. Such a request would presumably give rise to some concomitant responsibility on the attorney's part for the visitor's conduct. Furthermore, Sanchez is a paroled felon.* Despite statements in Borroto's petition in the district court, Sanchez does not yet have a Master's degree in criminal justice and is a "law student" only in the sense that he may be clerking for an attorney.** Lastly, there is no allegation in

* See the affidavit of Assistant United States Attorney Peter C. Salerno, sworn to December 23, 1974, submitted in opposition to Borroto's mandamus petition in this Court.

** See the footnote at page 5 of the affidavit cited in the previous footnote.

the instant case that any legitimate class of persons who might render aid to a prisoner is subject to an absolute ban from West Street. Thus there is no "substantial burden on the right of access to the courts" of the sort proscribed by Procunier v. Martinez, 416 U.S. at 420.

Johnson v. Avery, supra, also does not aid Borroto. That case, heavily relied upon by the Supreme Court in Procunier v. Martinez, "struck down a prison regulation prohibiting any inmate from advising or assisting another in the preparation of legal documents." Procunier v. Martinez, 416 U.S. at 421 (emphasis added). Here again, the question was the validity of an absolute ban on aid to prisoners by a class of persons, without a specific showing that effective prison administration required such a ban. The Supreme Court was careful to note:

"[T]he State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities."

393 U.S. at 490.

Sanchez' so-called exclusion from West Street is also supported by the Supreme Court's recent decision in Saxbe v. Washington Post Co., 417 U.S. 843 (1974). In that case the Court upheld a Federal Bureau of Prisons policy (which is of course applicable to West Street) that barred press interviews with individual inmates. The Court relied in part on the companion case of Pell v. Procunier, 417 U.S. 817 (1974), in which the Court impliedly held that "the entry of people into prisons for face-to-face communication with inmates" could constitutionally be subject to more restrictions than written communications, 417 U.S. at 826, and that prisoner's rights to communicate with the outside world generally were adequately protected by the alternatives of writing and communicating through permitted visitors. Id.

In Saxbe v. Washington Post Co., the Court noted that the press restrictions it was upholding were "no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate."

417 U.S. at 849. The only category Sanchez can colorably claim to fall into is that of "friend," and the Court apparently approved of more limited visiting privileges respecting persons in that category. Id. at 846.

Access to a federal prison by one in Sanchez' position is a matter of administrative discretion. Since Sanchez is still a parolee and has no authority for his actions on behalf of Borroto, restricting his access to such an institution is perfectly reasonable. None of appellant's rights have been violated by restrictions on Sanchez' visits to West Street.

POINT II

THIS COURT COULD DISMISS
THIS APPEAL FOR MOOTNESS

Since the relief sought in the District Court and on this appeal would, if granted, have affected Borroto only while he was at West Street, and since he has been transferred to another institution, apparently without objection, a decision by this Court could not affect his rights. See DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); North Carolina v. Rice, 404 U.S. 244, 246 (1971).

The instant case is similar to Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970), cert. denied, 402 U.S. 953 (1971). Plaintiff sought declaratory and injunctive relief challenging the allegedly wrongful expulsion of her son from a school band and the conduct of religious services at school. She also sought money damage for her own allegedly wrongful dismissal from her teaching post. The court held that the claims for declaratory and injunctive relief became moot when the plaintiff and her son moved to another city and the son enrolled in another school. 432 F.2d at 218, 220.

Carroll v. Associated Musicians of Greater New York, 316 F.2d 574 (2d Cir. 1963), is also on point. The plaintiffs, who were orchestra leaders and union members, sought to enjoin certain assessments made by the union against leaders who were members. The plaintiffs were expelled from the union after the commencement of the action, and the court held that since they were no longer required to make the challenged payments, they had no standing to prosecute the action. See 316 F.2d at 575. The Court noted that reinstatement was not sought, and it then approved the following statement by Judge Friendly in an unreported memorandum filed in the case: "When the proof showed that the

basis for relief alleged in the complaint, to wit, union membership, had ceased, plaintiffs had the burden of showing other circumstances qualifying them for relief."

In the instant case, there are no such "other circumstances." Borroto quite simply has no present connection with West Street, and no legally protectable interest in obtaining the relief sought in his petition.

CONCLUSION

The order of the district court denying appellant's application for a writ of habeas corpus or mandamus should be affirmed.

Respectfully submitted,

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United States Attorney for the
Southern District of New York
Attorney for Respondents-
Appellees

PETER C. SALERNO
Assistant United States Attorney
Of Counsel

March 6, 1975

AFFIDAVIT OF MAILING

CA 74-8429

State of New York)
County of New York) ss

Pauline Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 7th day of
March 1975 she served a copy of the within
govt's brief

by placing the same in a properly postpaid franked envelope
addressed:

~~Ricardo Borroto,~~
~~#27 West St.~~
~~Federal House of Corrections,~~
~~New York, NY 10014~~

Ricardo Borroto,
Registered No 87236-131
Federal Prison, Camp
Eglin Air Force Base
Florida, 32542

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

7th day of March 19 75

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975

